



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FOF - 174121

PRELIMINARY RECITALS

On May 5, 2016, the below named Petitioner filed a hearing request under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to disqualify the Respondent from the FoodShare program for a period of one year.

The hearing was originally held on June 17, 2016, in Milwaukee, Wisconsin. The Respondent did not appear for the hearing and it was conducted in her absence. The Respondent later contacted the Division of Hearings and Appeals on July 15, 2016, and indicated that she missed the hearing, because she was in the process of moving and the hearing “just slipped” her mind. A new hearing date was scheduled for August 9, 2016. The hearing took place as scheduled, with the Respondent present.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV)

NOTE: Judicial notice is being taken of the plea agreement and conviction in case [REDACTED] [REDACTED] [REDACTED], from the Federal District Court

The Record was held open until the end of the day to give the agency an opportunity to submit an EBT Card Issuance/Return History. It has been marked as Exhibit 16 and entered into the record.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED], Income Maintenance Specialist Advanced
1220 W. Vliet St., Room 106
Milwaukee, WI 53205

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits between April 2012 and April 2013. She typically received her benefits on the 15th of the month and received between \$272 and \$367 per month in benefits. (Exhibit 5)
2. On February 21, 2012, the Respondent completed an ACCESS application, which contained a penalty warning advising the Respondent of the consequences of selling or trading her benefits, including disqualification from the FoodShare program. The Respondent electronically signed the application, acknowledging that she understood the consequences of providing false information or breaking the rules. (Exhibit 9)
3. On February 23, 2012, the agency sent the Respondent an Eligibility and Benefits booklet that warned her about the consequences of selling or trading her benefits, including disqualification from the program. (Exhibits 10 and 11)
4. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but he was no longer a subcontractor distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. The recipients did not receive any food items. This conduct continued until January 2013. (Exhibit 12)
5. On July 17, 2012, an EBT card ending in [REDACTED] and attributed to the Respondent was used to make a \$100 "purchase" with [REDACTED] (Exhibit 15)
6. The card ending in [REDACTED] was issued to the Respondent on March 12, 2012 and was not replaced until December 27, 2012. (Exhibit 14)
7. On May 16, 2015, Milwaukee Enrollment Services (the agency) prepared an Administrative Disqualification Hearing notice, alleging that the Respondent trafficked \$100 in benefits with [REDACTED] on July 17, 2012. (Exhibit 3)

DISCUSSION

What is an IPV?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation,

transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the Agency's Burden of Proof?

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the

contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent committed the IPV.

The Merits of the Agency’s Case

It is found that Milwaukee Enrollment Services (the agency) has established, by clear and convincing evidence, that the Respondent was selling her FoodShare benefits on July 17, 2012.

First, the Respondent redeemed benefits in a whole dollar amount, \$100. This makes it less likely she made a legitimate food purchase. Second, the EBT card that was used was not replaced by the Respondent until December 27, 2012, five months after the subject transactions making it unlikely the Respondent’s card was lost or stolen on July 17, 2012. Third, during this time, [REDACTED] was no longer a subcontractor distributing meat and seafood; it/he was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling her benefits.

Based upon the foregoing, it is found that the Respondent was trafficking her FoodShare benefits on July 17, 2012.

At the hearing, the Respondent claimed that she would give her EBT card to family members or friends who were in need and allow them to use her FoodShare benefits. The Respondent’s claim is not credible. It is difficult to believe that someone who is in need of public assistance would willingly give away her FoodShare benefits, especially when she has a dependent. Further, the Respondent couldn’t recall who she would loan her card out to and when pressed for further

information was evasive, simply claiming it was just too long ago to remember who she might have given her EBT card to. Again, it is difficult to believe a person wouldn't remember who she gave her benefits to, if she was, in fact, sharing them. Finally, the Respondent's claim that she allowed others who were in need to use her benefits, is inconsistent with her claim that she would never sell her benefits, because she needs them. Based upon the foregoing, it is found that the Respondent's claim that someone else sold her benefits is not credible.

Even if I accepted the Respondent's testimony as true, she would still have violated the rules of the FoodShare program. Wis. Stats. §49.795 describes various food stamp/Food Share offenses and under subsection 3 states that, "no person may knowingly issue food coupons to a person who is not an eligible person..." 7 CFR §271.5(b)(1) states that individuals who knowingly transfer coupons, authorization cards, or access devices, between \$100 and \$5000 in value, in any manner contrary to the Food and Nutrition Act of 2008, is guilty of a felony. So, by giving her family members or friends her FoodShare benefits, the Respondent would have violated the foregoing statutory and regulatory provisions and still be guilty of violating the rules of the Foodshare program.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977).

There is nothing in the record to rebut the presumption that the Respondent knew what she was doing. On the contrary, the Respondent was warned in the February 2012 application she signed about the consequences of the selling her benefits, including disqualification from the program, and she was warned again in the Eligibility and Benefits Booklet the agency sent her that same month, but she went ahead and sold her benefits anyway. The Eligibility and Benefits booklet also warned her about giving her PIN number to other people.

CONCLUSIONS OF LAW

The Respondent committed an intentional program violation (IPV) by trafficking her benefits with [REDACTED] on July 17, 2012.

THEREFORE, it is

ORDERED

That the IPV for claim number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge

made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

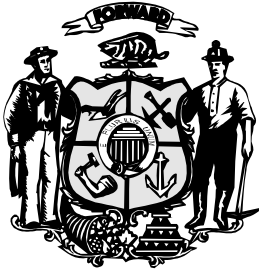
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of
Milwaukee, Wisconsin, this 12th day of
August, 2016.

\s _____
Mayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

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The preceding decision was sent to the following parties on August 12, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@dhs.wisconsin.gov